Supreme Court, U.S.
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No. 01-19

In The

Supreme Court of the United States

F/V QUALITY ONE, IN REM;
NUNYA, INC., IN PERSONAM,

Petitioners,

v.

GOWEN, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT GOWEN INC.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Gowen, Inc., the Plaintiff below and Respondent here, respectfully requests that this Court decline to issue a Writ of Certiorari to review the judgment entered in this case by United States Court of Appeals for the First Circuit.

STATEMENT OF THE CASE

Although Gowen agrees generally with the descriptions of the proceedings below set forth in the statement of the case presented by the Petitioners, Petition at 1-2 (but not the expository material in Sections A,B,C, *id.* at 2-5), Gowen believes certain additional factors are important. Neither defendant *in rem* F/V Quality One nor defendant *in personam* Nunya, Inc., filed an answer. Nunya failed to file a claim to the vessel as required by Federal Rule of Civil Procedure C(6). Nunya was defaulted (default judgment) on liability. The warrant of arrest issued with respect to the F/V Quality One specifically arrested the vessel with her appurtenances.[1] When Gowen moved for interlocutory sale of the vessel, it specifically requested that the vessel be sold with her

[1] Thus, Petitioners' insinuation, Petition at 4-5, that the fishing permits were not arrested because they are not individually identified in the warrant of arrest is without merit. There is no authority requiring that each appurtenance be individually listed in the Complaint or in the warrant.

federal fishing permits as appurtenances. Neither petitioner contested the motion for interlocutory sale. The district court ordered the interlocutory sale of the vessel with the permits.

In addition, evidence was presented to the district court, and the court found, that

> [t]oday, however, commercial fishing permits in some fisheries are so rare, and so limited, that the permits themselves are quite valuable. Stated another way, a fishing vessel without federal fishing permits is far less valuable than a similar boat with federal fishing permits. Indeed, several of the witnesses at the evidentiary hearing testified that they would assign little or no value to the Quality One (aside, presumably, from a scrap value) if it were to be sold without its fishing permits.

Gowen, Inc. v. F/V Quality One, 2000 A.M.C. 2225, 2000 WL 893402 at *2 (D. Me. 2000). Similarly, the First Circuit noted that "testimony during the district court hearing made clear that the F/V Quality One's permits contributed substantially to the vessel's value. . . . " *Gowen, Inc. v. F/V Quality One*, 244 F.3d 64, 68 (1st Cir. 2001). For present purposes, what matters is that vessels like the F/V Quality One are primarily valuable because of their permits.

REASONS FOR DENYING THE WRIT

Gowen agrees that the issue decided by the Courts below was one of first impression, but disagrees that this case meets the standard of Supreme Court Rule 10 for

granting the writ. The Petitioners present the usual parade of horribles, some of which evaporate completely upon examination, and some of which are likely never to materialize. Neither the district court nor the First Circuit reached these issues, appropriately, because they were not before those courts, nor are the hypothetical factual circumstances alluded to by the Petitioners before this Court. In other words, precisely because this is a case of first impression, this Court should decline to review it before determining whether, in fact, the sorts of problems complained of by the Petitioners, or other problems, develop as other lower courts grapple with the same issue.

Petitioners assert, at Petition p. 6, that the First Circuit's decision makes no mention of how the Magnuson-Stevens Act's "exclusive registry," *see* 16 U.S.C. § 1855(h), and maritime lien law will interact once the (belated) registry required by the Act is actually established. Actually, the First Circuit did allude to this issue, noting that the Magnuson-Stevens Act only establishes a registry for purposes of *perfecting* security interests with respect to third parties without notice of such security interests. 244 F.3d at 69-70 (*citing* 16 U.S.C. § 1855(h)(3), (4)). In this case, there were no such third parties, and nothing in the Magnuson-Stevens Act requires perfection as between the creditor and the vessel, which is the situation presented by this case. Since, as between the debtors and the maritime lien creditor, no filing would be required even if the Magnuson-Stevens Act registry applies to maritime liens, *compare* 16 U.S.C. § 1855(h)(4) (defining "security interest" to include "liens" but omitting mention of maritime liens) *with* Gilmore & Black, *The Law of Admiralty* (2d Ed.

1975) at 586 ("A maritime lien, so-called, is not a lien at all in the common law sense of the term"), if the Magnuson-Stevens Act registry had existed at the time of the proceedings below, it would have had no effect whatsoever in this matter.

It is noteworthy that, despite the Petitioner's assertions that fishing permits are personal licenses of the owner and therefore not subject to maritime liens, Petition at 5, 8-9, Congress stated quite plainly when it established the central registry for security interests in fishing permits that "[m]any participants in limited access fisheries use permits as loan collateral to finance the acquisition of the permit itself or to otherwise finance their operations." S. Rep. No. 105-275, at 25-26 (1996), *reprinted in* 1996 U.S.C.C.A.N. 4073, 4098-99. If security interests may be granted and enforced in such permits (which is the reason for being of the registry), it is apparent that the nature of the permits is such that liens may attach. If permits can be lienied, why shouldn't maritime liens attach? Petitioners assert that permits are more closely analogous to a revocable license and that there is no property interest that is granted with the permits. Petition at 8. This view of the permits is belied by the Magnuson-Stevens Act itself, which specifically recognizes that security interests (which are interests in property) attach to such permits and creates a registry for perfecting such liens against the claims of others.

Conti v. United States, 48 Fed. Cl. 532 (Ct. Cl. 2001), relied on by the Petitioners, is not to the contrary. *Conti* engaged in an extensive analysis of limited access fishing permits to determine whether a change in the fishing

methods allowed to the holder of a limited access fisheries permit had effected a taking. The plaintiff was not deprived of his permit. The court held in that context that such permits were "not intended to create a property right within the meaning of the Fifth Amendment." *Id.* at 538. *But see American Pelagic Fishing Co. v. United States*, 49 Fed. Cl. 36, 48 n.4 (Ct. Cl. 2001) (legislation precluding owner from using vessel to fish and resulting in revocation of permit effected a taking, distinguishing *Conti* and noting that Conti's permit had not been revoked).

That fishing permits are distinguishable from personal licenses is also borne out by the undisputed fact that the permits may be sold with the vessel, 50 C.F.R. § 648.4(a)(1)(D), or (with some difficulty) without it. *See Gowen, supra*, 2000 WL 893402 at * 2 n.5. Indeed, the regulations creating the permits at issue state that the permits are "presumed to transfer with the vessel whenever it is bought, sold, or otherwise transferred. . . . " 50 C.F.R. § 648.4(a)(1)(D). Although neither lower court relied on the regulations for its ruling, Gowen submits that the arrest and interlocutory sale of the vessel fits comfortably within the phrase "sold or otherwise transferred."

Petitioners assert that because the fishing permits are issued on a regional basis and/or are species specific, the maritime doctrine of uniformity will be compromised, allegedly because fishing permits will constitute appurtenances in some regions but not in others. Petition at 7. Petitioners are mistaken. If permits are easier or cheaper to obtain in one region than another, they may have less value on the auction block, but their nature does not change, just as a vessel fitted out for shrimping in the

Gulf of Mexico might bring a lower price if seized and sold in Portland, Maine than it would if it were seized and sold in Galveston, Texas. If the federal fishing permits, all of which are creatures of a regulatory scheme, *see generally* 50 C.F.R. Parts 600 *et seq.*, are appurtenances, then they are appurtenances. If they are less valuable in one locale than another, that is a different issue.

Petitioners also question what will happen if a fishing vessel is lost and the permit transferred to a replacement vessel because, they assert, under traditional maritime lien law, the loss of the *res* extinguishes the lien. Petition, 7. Petitioners worry that if the permit for the lost vessel were transferred to a different vessel, as sometimes may be permissible under the applicable regulations, the liens claimed on the lost vessel could follow the permit to the different vessel.

The Petitioners mistake the difference between the vessel itself and an appurtenance to the vessel. Appurtenances to the vessel are seized with the vessel itself so long as they are appurtenances. Petitioners fail to cite any case that shows that, for instance, if a radar unit is on a vessel at the time the lien attaches, and is later sold to another vessel, the radar unit on the second vessel can be arrested when the first vessel is seized. Rather, absent fraud, the radar unit becomes an appurtenance of the second vessel when it is placed on it.

Another hypothetical scenario imagined by the Petitioner is service of process upon the National Marine Fisheries Service to, presumably, arrest the permits when the vessel itself has not been seized. Again, the Petitioners mistake the First Circuit's ruling. The First Circuit

did not rule that the permits are intangible property that may be seized independently of the vessel under the federal rules. The First Circuit held that the permits are appurtenances of the vessel that are seized when the vessel itself is seized. Since, except under limited and temporary circumstances, the permits are always associated with a vessel, *see* 50 C.F.R. § 648.4(a)(1) ("vessel must have been issued . . . a valid permit"), § 648. 4(a)(1)(D), Petitioners' hypothetical scenario is simply not an issue. Again, it must be noted that the maritime lien in this case arose against a vessel. Petitioners have demonstrated no scenario or authority under which a *maritime* lien could attach to a permit independent of the vessel to which it is issued.

It is true that, before this case, there is no authority holding that fishing permits are subject to arrest as appurtenances of the vessel. Older cases cited by the petitioners may establish the parameters of maritime lien law but do not mention permits because, when those cases were decided, there were no such permits. Things have changed. Now, as the district court observed, the permits are as critical to the ability of fishing boats to fish as are the nets and other gear. The commercial mission of the vessel and its value are inextricably linked to the permits, and, as the district court observed, a ruling that maritime liens do *not* attach to the permits as appurtenances will make it considerably less likely that fishermen will be able to obtain much needed credit for repairs and gear. *Gowen*, 2000 WL 893402 at *3.

That the permits have value is not disputed. Indeed, in *Bank of America, NT & SA v. Pengwin*, 175 F.3d 1109 (9th Cir. 1999), although apparently no parties contested that

the permits were subject to arrest for maritime liens, *id.* at 1111-12, the parties did dispute whether the fact that the vessel would be sold with her permits must be advertised in the auction notice, presumably because the failure to do so brought a lower purchase price for the vessel.

In any event, despite the Petitioner's assertion that *Racal Survey USA, Inc. v. M/V Count Fleet*, 231 F.3d 183 (5th Cir. 2000),[2] holds that maritime lien law is not to be extended, Petition at 6-7, courts have extended the concept of appurtenances to new types of gear and property when the conditions of maritime commerce have changed. If Petitioner's argument that the appurtenances subject to maritime liens are frozen in the mists of time were valid, only sails, nets and blocks and tackle could be seized and sold. As the First Circuit noted, "from the standpoint of policy, no obvious arguments exist against treating the permits as subject to lien. We have assumed, as appellants assert, that the permits could in some circumstances be severed from the vessel upon its sale and be retained by its old owner. The courts have repeatedly upheld maritime liens upon 'severable' equipment, including, surprisingly enough, equipment merely *leased* to the owner." 244 F.3d at 69 (emphasis in original, citations omitted).

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[2] Racal held that maritime lien law could not be extended to allow a lien to attach on behalf of a ship owner to property of a charterer other than cargo, a quite different issue. 231 F.3d. at 192

CONCLUSION

The First Circuit did not err. This Court should deny the Petition.

Respectfully submitted,

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